

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LA'KEY JAMAR MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED

November 20, 2008

No. 278533

Wayne Circuit Court

LC No. 07-003984-01

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals that portion of the judgment of sentence requiring him to pay appointed counsel costs of \$400. Because we conclude that the trial court improperly ordered defendant to pay the costs without indicating whether it considered defendant's present and future ability to pay, we vacate that portion of the judgment and remand for further proceedings. In all other respects, we affirm. This appeal has been decided without oral argument under MCR 7.214(E).

The trial court conducted a bench trial and convicted defendant of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The trial court sentenced defendant to five years in prison for felony-firearm, second offense, and to a concurrent term of probation for delivery of less than 50 grams of cocaine. The trial court entered a conforming judgment of sentence that ordered defendant to pay statutory and court costs, and \$400 in appointed counsel costs.

In *People v Trapp*, ___ Mich App ___; ___ NW2d ___ (2008), this Court explained:

A person who was afforded appointed counsel might be ordered to reimburse the county for the costs of that representation, if such reimbursement can be made without substantial hardship. A court need not make specific findings on the record regarding the defendant's ability to pay, but must provide some indication that it considered the defendant's financial situation prior to ordering reimbursement. The amount to be reimbursed must be related to the defendant's present and future ability to pay. A court must afford the defendant notice and an opportunity to be heard prior to ordering repayment for appointed counsel expenses. *People v Dunbar*, 264 Mich App 240, 251-255; 690 NW2d 476 (2004); MCR 6.005(B).

MCL 769.1k, which became effective on January 1, 2006, provides in pertinent part:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(i) Any fine.

(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

(iii) The expenses of providing legal assistance to the defendant.

(iv) Any assessment authorized by law.

(v) Reimbursement under section 1f of this chapter.

This statute does not eliminate the requirement, set forth in *Dunbar, supra*, that the trial court consider a defendant's ability to pay prior to ordering reimbursement of appointed counsel costs. See *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007). [*Trapp*, slip op at 1-2.]

Defendant failed to object to the order requiring him to pay appointed counsel costs; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The trial court did not mention the topic of reimbursement during the sentencing hearing. Nothing on the record indicates that the trial court gave any consideration to defendant's ability to pay prior to ordering reimbursement. For this reason, we vacate that portion of the judgment that required defendant to reimburse the county \$400 for appointed counsel costs, and remand this matter with instructions that the trial court consider defendant's present and future ability to repay these costs.

A remand for further proceedings is necessary, *Dunbar, supra* at 251-255, but an evidentiary hearing is not required on remand. The trial court may obtain and rely on an updated report from the probation department. *Id.* at 255 n 14. If the trial court concludes that it should eliminate or modify the reimbursement requirement, it should enter an amended judgment of sentence to that effect. MCL 769.1k authorizes entry of an order requiring repayment of attorney fees; thus, such an order may be made part of the judgment of sentence, if appropriate. See *Trapp*, slip op at 2-3.

We reject plaintiff's invitation to invoke the conflict case proceeding in MCR 7.215(J) to revisit the decision in *Dunbar, supra*. Our Supreme Court recently declined to grant leave to

consider the merits of that decision. See *People v Carter*, 480 Mich 1063; 743 NW2d 918 (2008).

We vacate that portion of the judgment of sentence requiring payment of attorney fees, affirm the judgment in all other respects, and remand for further proceedings. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski